TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 198.

HENRY A. V. POST, ARCHER N. MARTIN, AND CHARLES C. POMEROY, COMPOSING THE FIRM OF POST, MARTIN AND COMPANY, APPELLANTS,

vs.

EDWARD CARR, OWNER OF THE STEAMSHIP "INDIA."

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED NOVEMBER 1, 1883.

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INDEX.

	Original.	Print.
Caption	1	1
Transcript from district court	2	1
Caption	3	1
Libel	4	1
Exhibit A—Charter party, November 4, 1881	11	5
B—Bill	15	7
C— "	16	8
D— "	16	8
E— "	16	8
F— "	17	9
Claim of Post, Martin & Co	17	9
Answer and intervention of Post, Martin & Co.	19	10
Stipulation of claimant to abide decree	26	13
Order releasing iron, &c	28	15
Answer of A. & N. W. R. R. Co.	29	15
Affidavit and motion for rule to show cause	31	16
Writ to show cause	33	18
Marshal's return	34	18
Order to show cause, &c	35	18

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Order dismissing rule	36	19
Order setting cause for hearing	36	19
Amended libel	36	19
Decree	38	20
Order allowing appeal	41	22
Appeal	42	22
Hearing and submission	43	23
Opinion	44	23
Certificate of clerk to opinion	48	25
Decree	49	26
Draft of decree enrolled and signed by the judge	52	27
Appeal bond	55	28
Certificate of clerk to record	60	31

1 *Freight, Demurrage, etc.*

In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, Holding Sessions at Galveston.

EDWARD CARR, Owner of the Steamship "India," Libellant,
v.
AUSTIN & NORTHWESTERN RAILROAD COMPANY, POST, MARTIN & Co., Claimants.
} On Appeal. No. 1196.

Be it remembered that in the above entitled and numbered cause, lately pending in said court, in which final judgment was rendered at the regular November term of said court, 1882, to wit, on the 16th day of November, A. D. 1882, the Honorable Don A. Pardee, judge of the circuit court of the United States for the fifth circuit, presiding, the following proceedings were had and taken in said court, to wit:

2 *Transcript from District Court. Filed in Circuit Court May* 13, 1882.

3 In the District Court of the United States for the Eastern District of Texas, at Galveston. In Admiralty.

EDWARD CARR, Owner of Steamship "India,"
vs.
THE AUSTIN AND NORTHWESTERN RAILROAD COMPANY.
} No. 528.

Demurrage.

Be it remembered that in the above entitled and numbered cause, lately pending in said court, in which final judgment was rendered at the regular March term A. D. 1882 of said court, to wit, on the 22nd day of April, A. D. 1882, the Honorable Amos Morrill, judge, presiding, the following proceedings were had and taken in said court, to wit:

4 *Libel. Filed March* 23, 1882.

To the Honorable Amos Morrill, district judge of the United States for the eastern district of Texas:

The libel of Edward Carr, owner of the steamship "India," against the Austin and Northwestern Railroad Company, a duly incorporated company, organized under a law of the State of Texas, having its principal office in Travis county, State of Texas, and of which company — Homberg is president and Francis B. Foster, of said county and State, is secretary, in a cause of contract, civil and maritime, alleges as follows:

First. That some time in the month of November, 1881, the said steamship then being in the Tyne and expected ready about the fifteenth day of said month, the libellant made and concluded with Frederick Edwards, as agent, a charter-party, a copy of which is

hereto annexed, bearing date the fourth day of November aforesaid, by which the libellant, for and in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the said Frederick Edwards, did covenant and agree, on the freighting and chartering of the said steamship unto the said Frederick Edwards, as agent, for a voyage from Middlesbro-on-Tees to Galveston Bay, for the charter money and on the terms and conditions mentioned in the said charter-party.

Second. That, among other things, it was therein and thereby agreed between the libellant and the charterer that the said
5 ship should proceed to Middlebro-on-Tees, or so near thereto as she may safely get, and there load from the factors of the said affreighters a full and complete cargo of rails, say 1,700 to 1,800 tons, at owner's option, not exceeding thirty feet in length and not exceeding what she can reasonably stow and carry, &c., and being so loaded shall proceed therewith to Galveston Bay, or so near thereunto as she may safely get, and deliver the same on being paid freights at and after the rate of twenty-two shillings and sixpence sterling per ton of twenty hundred weight.

The captain to sign bill of lading at any rate of freight without prejudice to the said charter-party, but if at less than charter-rate difference to be paid by charterers before sailing.

The freight to be paid one-half in advance on signing bill of lading, subject to a deduction of three per cent. for interest and insurance, and the balance on right and true delivery of the cargo, in cash, at the current rate of exchange for sixty days' sight banker's bill on London; vessel to be loaded as fast as she can properly receive and stow during working days and hours, and to be discharged according to the custom of the port, but at not less than two hundred and fifty tons per running day, Sundays and Government holidays excepted, in both cases commencing twelve hours after notice of readiness, and ten days on demurrage over and above the said laying days, at £35 per day, vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage, which
6 she is bound to exercise. On shipment of the cargo and payment of advance freight and any demurrage incurred charterers' liability is to cease.

Third. That the said steamship having been put in readiness to perform the aforesaid voyage proceeded to Middlebro-on-Tees and there loaded from the factors of the said affreighters ten thousand nine hundred and sixty-four iron rails, weighing one thousand seven hundred tons two quarters and fourteen pounds, and the master of said steamship, after having received said cargo on board from the shippers, Sanders Brothers, at the request of the charterers and in conformity with the stipulations in the said charter-party at Middlebro-on-Tees, on the thirtieth day of November, 1881, signed the usual bill of lading for said cargo to be delivered at the said port of Galveston Bay unto order or to their assigns, a copy of which is hereto annexed.

Fourth. That shortly after the said steamer set sail from Middlebro-on-Tees to Galveston Bay with the iron rails on board and there, or as near thereunto as she could safely get, safely arrived on or

about the 29th day of December, 1881, and caused a written notice to be served on J. O. Kishpaugh, on the said 29th day of December, 1881, the agent of respondent, of the arrival of the steamer, her entry at the custom-house and readiness to discharge cargo, and in said notice called said agent's attention to the fact that the steamer's lay days would begin on the morning of the 30th December,
7 1881, and that according to the charter-party the consignees have to lighter the cargo at their expense at the rate of not less than two hundred and fifty tons per running day, Sundays and Government holidays only excepted, and on the following day, December 30th, 1881, received a reply in writing from the said Kishpaugh that he had been instructed to provide lighterage for said cargo.

Fifth. That said respondent accepted said cargo and commenced to receive the said iron rails from the steamer as she delivered it; that the steamer held herself in readiness to and could have delivered two hundred and fifty tons per running day, commencing from the morning of the 30th of December, 1881, which was twelve hours after giving the said notice of her arrival, &c.; but, notwithstanding such notice was duly given to the respondents, and notwithstanding the said steamer was from that time ready and could have delivered two hundred and fifty tons of said iron rails per running day, and notwithstanding there was no fault or remissness on the part of the libellant, the said respondents, by their own default, did not discharge said cargo according to the custom of the port, and did not discharge said cargo at the rate of two hundred and fifty tons per day, and refused to take it save in small quantities and at irregular times, capriciously and vexatiously, and detained said steamer until January 13th, 1882, whereas if respondents had taken from
8 said steamer two hundred and fifty tons per day, Sundays and Government holidays excepted, the steamer would have been completely discharged on the 7th day of January, 1882.

Sixth. That on the signing of the said bill of lading the said Sanders Bros. paid one-half of the freight in advance, to wit, nine hundred and twenty-seven pounds 11, 3, as stipulated in said charter-party, which said payment was endorsed on the back of said bill of lading, and of which charter-party, the terms, conditions, and agreements therein, the respondents had and have full notice and accepted said bill of lading and cargo with full knowledge of the terms, conditions, and agreements specified in charter-party, and became and *is* bound thereby.

Seventh. That by reason of the premises the respondent became bound to pay to libellant the balance of the freight for said iron rails and primage, which amounts to one thousand and eighty pounds eleven shillings and 11d., which, at the current rate of exchange for sixty days' sight banker's bill on London, is worth the sum of five thousand one hundred and eighty-six $\frac{86}{100}$ dollars in United States currency, as is more particularly set forth in the bill hereto annexed, marked A.

Eighth. That by reason of the premises and the respond-
9 ent's failure to take from and discharge said steamer at the

rate of two hundred and fifty ons per day, and the unjust detention of said steamer for five days after the sufficient time to discharge said cargo, to wit, the 8th, 9th, 10th, 11th, and 12th days of December, 1881, libellant became entitled to demand from respondent demurrage for said five days at the rate of thirty-five pounds per day, amounting to one hundred and seventy-five pounds, which is worth eight hundred and forty dollars in United States currency, as is more particularly set forth in the bill hereto annexed, marked B.

Ninth. That, notwithstanding the earning of said freight money, and notwithstanding the said unjust detention, respondent refused to pay said freight money or said demurrage, and put libellant to great expense in the preservation and keeping of a portion of said cargo, to wit, sixteen hundred and five bars of said iron rails, so that libellant's lien thereon for all freight, dead freight, and demurrage can be enforced and foreclosed, to wit, $28.50 *dollars* paid by libellant to J. W. Rogers for watching said iron rails on the wharf at Galveston for nine and a half days, at three dollars per day, as is more particularly set forth in the bill hereto annexed, marked C; and twenty-seven ($27) dollars paid by libellant to Charles White for watching said iron rails on the wharf at Galveston for nine days, at three dollars per day, as is more particularly set forth in
10 the bill hereto annexed, marked D; and seventy-five ($75) dollars paid by libellant to the Galveston Wharf Company for wharfage on said sixteen hundred and five bars of iron rails, which weighs two hundred and fifty tons, as is more particularly set forth in the bill hereto annnexed, marked E; and two hundred and fifty dollars paid by libellant to W. C. McDonald for loading said iron rails on "floats," and hauling same to said McDonald's yard, and unloading and storing same in the yard of said McDonald, as is more particularly set forth in the bill hereto annexed, marked F, amounting in the aggregate to three hundred and eighty $\frac{50}{100}$ dollars.

Tenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore libellant prays that a monition or citation, according to the course and practice of this honorable court in admiralty and maritime cases, may issue against the said respondents, and that it be cited through its president or secretary to appear and answer all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the freight money aforesaid and the demurrage aforesaid and the expenses incurred aforesaid and foreclosing the lien on said sixteen hundred and five bars of
11 iron rails which are on storage in the yard of W. C. McDonald in Galveston city, Galveston county, Texas, within the jurisdiction of this honorable court, with costs, and that libellant may have such other and further relief as in law and justice libellant is entitled to receive.

J. MOLLER.

McLEMORE & CAMPBELL,
Proctors.

J. Möller, being sworn, says that he is agent of Edward Carr, the libellant above named; that said libellant is absent from the district, being, as deponent believes, in Hamburg, Germany; that the above libel is true according to the best of his knowledge and belief.

J. MOLLER.

Sworn to and subscribed before me this seventh day of March, A. D. 1882.

Witness my hand and official seal.

[SEAL.] WM. R. JOHNSON,
United States Commissioner in & for the Eastern District of Texas, at the City of Galveston.

Charter-Party.

(A)

David Brown & Co., ship brokers, 147 Leadenhall street, London.

A true copy of the original stamped charter-party in our possession.

DAVID BROWN & CO.

Five per cent. commission is due on the segment of this charter-party to David Brown & Co., and the ship to be addressed at ports of loading and discharge for custom-house business to them or their agents.

LONDON, *Nov. 4th*, 1881.

It is this day mutually agreed between Edward Carr, Esq., of Hamburg, owner of the good steamship or vessel called the
12 "India" (new), to be classed 100 A 1, Lloyds, of the measurement of 1,050 tons net register, or thereabouts, now in the Tyne, and expected ready about the 15th inst., and Fred'k Edwards, agent for merchant.

That the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall with all possible dispatch sail and proceed to Middlebroson-Tees when ordered by charterers, but, when she can, lay always afloat, or so near thereunto as she may safely get, and there load from the factors of the said affreighters a full and complete cargo of rails, say 1,700 to 1,800 tons, at owner's option, not exceeding 30 ft. in length, which is to be brought to and taken from alongside at merchant's risk and expense and free of lighterage to the ship, and not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed to Galveston Bay, or so near thereunto as she may safely get, and deliver the same, on being paid freight, at and after the rate of twenty-two shillings & sixpence st'g per ton of 20 cwt. del'd; the captain to sign B. lading at any rate of freight without prejudice to this charter, but, if at less than chartered rate, difference to be paid by charterers before sailing (the act of God, the Queen's enemies, insurrections, riots, fire, frosts, floods, strikes, lock-outs, accidents to mills or ma-

chinery, all and every other dangers and accidents of the seas, rivers,
and steam navigation of whatever nature and kind soever,
13 during the said voyage, always excepted).

The freight to be paid one-half in advance on signing B. lading, subject to a deduction of 3% for interest & insurance, and the balance on right and sure delivery of the cargo in cash at the current rate of exchange for 60 days' sight banker's bills on London. Vessel to be loaded as fast as she can properly receive and stow during working days & hours, & to be discharged according to the custom of the port, but at not less than 250 tons per running day, Sundays and Government holidays excepted, in both cases commencing 12 hours after notice of readiness and ten days on demurrage, over and above the said laying days, at £35 per day. Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage, which she is bound to exercise. Penalty for nonperformance of this agreement, —; estimated amount of freight, —.

On shipment of the cargo & payment of advance fr't, and any demurrage incurred, charterer's liability is to cease. For & by authority of—

EDWARD CARR,
(S'g'd) DAVID BROWN, & CO.,
As Agents.

Witness to the signature of
Ppro. FRED'K EDWARDS.

Witness to the signature of ——— ———:
(S'g'd) EDWARD LLOYD, as agent, 5, 11, '81.

S. S. "India," London, Nov'r. 4, '81. Rec'd Dec'r 20, '81.

Copy.

Shipped in good order and well conditioned by Sanders
14 Brothers in and upon the good ship called the "India,"
whereof — is master for this present voyage, and now riding at anchor in the Tees and bound for Galveston Bay, to, say:

One thousand seven hundred tons two quarters & fourteen pounds of iron rails, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Galveston Bay (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted) unto order or to their assigns, paying freight for the said goods with conditions twenty-two shillings & sixpence per ton, with primage and average accustomed.

In witness whereof I, the said master of the said ship, have affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the other two to stand void.

Dated in Middlebro-on-Tees this thirtieth day of November, in the year of our Lord one thousand eight hundred and eighty-one.

Lengths & weight unknown; not responsible for rust.

Marks on the margin :

		T.	C.		
10,171	rails, 30 ft.	1,589	4	1	14
477	" 28 "	69	11	1	"
193	" 26 "	26	2	2	25
98	" 24 "	12	5	"	"
25	" 22 "	2	17	1	3
10,964		1,700	2	0	14

Copy.

G. HABERLAND.

15 Endorsements: Received of Sanders Bros. the sum of nine hundred twenty-seven pounds 11.3 for the use of the ship S. S. India and owners, which sum I request them to deduct from settlement of freight at Galveston Bay, 30th November, 1881. £927, 11, 3. This amount covers insurance — interest.

Copy.

G. HABERLAND.

A.

Texas European Line of Packets.

GALVESTON, TEXAS, *Jan'y 9th*, 1882.

J. O. Kishpaugh, Esq., Agent Consignees to German S. S. " India " and Owners. J. Möller & Co., Agents.

Copy.

For freight, to wit:

	T.	C'w't.	Q'rs.	Lbs.			
On 10,964 rails, w'g't	1,700	0	2	14			
		@ 22	6d.		£1,912	10	8d.
Primage			@5%		95	12	6
					£2,008	3	2d.
Less advance received					927	11	3
					£1,080	11	11d.
				$4.80	$5,186.86.		

E. & O. E.

Received payment.

R.

Copy.

TEXAS EUROPEAN LINE OF PACKETS,
GALVESTON, TEXAS, *Jan'y 13th*, 1882.

J. O. Kishpaugh, Esq., Agent Consignees to German S. S. "India" and Owners. J. Möller & Co., Agents.

For demurrage as follows:

January 8, 9, 10, 11, 12, ac.
5 days, @ £35 0.0*d.* ---------- £175 0.0*d.*
@$4.80 ---------- $840 00

E. & O. E.
16 Received payment.

GALVESTON, *January 23rd*, 1882.

C.

S. S. India & Owners to Jos. Rodgers, Dr.

To watching R. R. iron on Kuhn's wharf levee, Jan'y 14½ to Jan'y 23rd, inclusive, 9½ days, at $3.00 per day ---------- $28 50

O. K.—M.
Appr.

J. H. ROUTEN.

Rec'd payment.

J. W. RODGERS.

D.

GALVESTON, *January 26th*, 1882.

S. S. India & Own'r—J. Möller & Co., Agents—to Charles White, Dr.

To watching lot R. R. iron on Labadie's wharf levee 9 days, from Jan'y 17th to Jan'y 26, at $3.00 ---------- $27 00

Appr.

J. H. ROUTEN.

Received payment.

CHAS. WHITE.

E.

GALVESTON, *Jan'y* 20, 1882.

J. Möller & Co., Ag'ts S. S. "India," to Galveston Wharf Co., Dr.

For wharfage on 250 tons R. R. iron, @ 30c. ---------- $75 00

Paid.

G. W. CO.,
Per J. AIKEN,
Vice-Consulate of Russia.

Cable address: Möller, Galveston. Use Watkin's or Scott's Codes.

F.

17 Jens Möller, Thos. H. Sweeney. J. Möller & Co., sail & steamship agents; importers of coal, salt, &c.

GALVESTON, TEX., *Jan'ry 25th*, 1882.

Received from Messrs. J. Moller & Co. the sum of ($250.00) two hundred and fifty dollars for loading, hauling, unloading, and storing (1605) sixteen hundred and five bars of railroad iron ex. German steamship "India," from east and west levees of Galveston wharf to our yards, where said rails now lie free of storage, subject to the order of Mess. J. Möller & Co.

$250.

W. C. MACDONALD, *S. M.*

The foregoing libel, with the exhibits thereto attached, endorsed as follows: "A. D. 528." "Edward Carr, owner of the steamship 'India,' *v.* Austin & Northwestern Railroad Company." "Libel." "We accept service of the within libel and agree to file answer 1st Monday in April, 1882." "Waul & Walker, proctors for the A. & N. W. R. R. Co." "Filed March 23rd, 1882. Geo. C. Rives, cl'k."

Claim of Post, Martin & Co. Filed March 23, 1882.

United States District Court, Eastern District of Texas, *ss.* Galveston.

In Admiralty.

18 EDWARD CARR, Owner of Steamship India, *v.* THE AUSTIN & NORTHWESTERN RAILROAD CO. } No. —.

To the Hon. Amos Morrill, judge of said U. S. district court:

The claim of Henry A. V. Post, Archer N. Martin, and Charles C. Pomeroy, composing the firm of Post, Martin & Co., all of the State and city of New York, to sixteen hundred and five bars of iron rails, weighing two hundred and fifty tons, a portion of the cargo of the steamship India, in the possession of and detained by J. Moller, agents of said steamship, to answer the libel of the said Edward Carr, filed in this honorable court to enforce a lien for freight, demurrage, and other expenses incident thereto, in all amounting to the sum of six thousand four hundred and seven & $\frac{36}{100}$ dollars, against said rails, alleges that the said Post, Martin & Co. are the true and *bona fide* owners of the said iron rails and no other person is the owner thereof; that this claim is made by J. O. Kishpaugh, agent of the said Post, Martin & Co., and that he is duly authorized by said company to make said claim.

And prays that this honorable court will be pleased to decree a restitution of the said two hundred and fifty tons of iron rails and otherwise right and justice to administer in the premises.

J. O. KISHPAUGH,
Agent for Post, Martin & Co.

WAUL & WALKER,
Proctors for Claimant.

2—198

19 Subscribed & sworn to before me this the 23rd day of March, 1882.

[SEAL.] GEO. C. RIVES,
Clerk U. S. Dist. Ct., E. D. T., G.

Request granted conditionally that applicants give bond in the sum of eight thousand dollars to abide the result of the suit.
March 23, '82.

AMOS MORRILL, *Judge.*

The bond having been given and approved let an order be made releasing the iron, the bond being a substitute therefor.
April 6th, 1882.

AMOS MORRILL,
Dist. Judge.

Endorsements: "A. D. 528." "In admiralty." "Edward Carr *v.* Austin & Northwestern R. R. Co." "Claim of Post, Martin & Co." "Filed March 23, 1882. Geo. C. Rives, cl'k."

Answer & Intervention of Post, Martin & Co. Filed Ap'l 3rd, 1882.

To the Hon. Amos Morrill, judge of the district court of the United States for the eastern district of Texas:

The answer of Henry A. V. Post, Archer N. Martin, and Charles C. Pomeroy, merchants, doing business in the city of New York under the firm name of Post, Martin & Co., intervening for their interest in sixteen hundred and five bars of railroad iron to
20 the libel of Edward Carr, owner of the S. S. India, answers and alleges as follows:

First. That these respondents are ignorant of the matters contained in the several articles of the said libel and have no personal knowledge of the same, but have understood and believe the same are in a great part falsely alleged and that the truth is as hereafter alleged.

Second. That these respondents are the owners of the said sixteen hundred and five bars of iron rails; that they purchased the same and instructed their bankers to draw upon them for the value of said iron rails when shipped, to be delivered at the port of Galveston Bay; that in pursuance of said instructions their said bankers advanced the money for said iron rails with the bill of lading attached, which bill of lading is properly described in the exhibit to article third of said libel, and that upon the faith of said bill of lading, as being the terms of the contract for the freight, transportation, & delivery of said iron rails, these respondents accepted and paid said sums of money so advanced and received said bill of lading, which is regularly assigned to these respondents and contains the following terms: "That said S. S. 'India'—, and now riding at anchor in the Tees and bound for Galveston Bay—to, say, one thousand seven hundred tons two quarters and fourteen pounds of iron

rails * * * to be delivered in the like good order and well conditioned at the aforesaid port of Galveston Bay."

Third. That the said sixteen hundred and five rails formed a part of said cargo and subject to all the conditions of the same as
21 enumerated in said bill of lading; that said bill of lading was signed by G. Haberland, master of said S. S. India, and was an independent contract made by and between Sanders Brothers, shippers of said iron rails, and said libellant by his agent, G. Haberland, the master of said S. S. India.

Fourth. That by the terms of the said bill of lading the said iron rails were to be delivered in the port of Galveston Bay free from all expense of lighterage on the part of this respondent or the assignees of the bill of lading; that said bill of lading is not inconsistent with the charter-party exhibited in said libel, and should the said bill of lading be considered inconsistent with said charter-party the remedy of said libellant, if any remedy he has, is against the charterers of said S. S. India and not against these respondents.

Fifth. That these respondents, by their agents, were at all times ready, on and after the said 30th day of December, 1881, to receive the said iron rails from said steamship in said Galveston Bay, at said port of Galveston Bay; of all which the said libellant, thro' his agents, had full notice that said steamship, not being able to cross the bar at the entrance of Galveston Bay so as to reach the port of Galveston Bay and there deliver said cargo, as by the said charter-party and the said bill of lading he was bound to do, the agents of these defendants procured, furnished, and became responsible for the payment of said lighterage for the said steamship and to facilitate the discharge of said cargo.

22 Sixth. Alleges that respondents are not liable to pay to libellant the amount claimed in the eighth article of said libel for demurrage, nor any other amount, as these respondents, by their agents, were ready and willing, as at all times, to receive said iron rails in Galveston Bay from said steamship or from said libellant or his agent on and after the said 30th day of December, 1881, and that said libellant, thro' his agents, refused to deliver the same, and that it was not the intention of said bill of lading, nor of said charter-party, by their conditions, to require these respondents to go out to sea to receive their freight, or to render them liable for demurrage on account of the delay caused by the failure of the libellant to be able or ready to deliver said iron rails in Galveston Bay.

Seventh. That any expense alleged in Art. 9th of said libel to have accrued on account of the holding and refusing to deliver said iron rails to these respondents was incurred through the libellant refusing to deliver & wrongfully withholding said iron rails. And respondents allege that on the 13th day of January, 1882, these respondents tendered to the agents of libellant the sum of one thousand eight hundred and twenty-four dollars, being the amount claimed by libellant, less $3,361.99, the amount of lighterage, and a deposit of $100.00 for a night watch, all of which was paid by defendants for and in behalf of said libellant, and the amount claimed for demurrage, for which these respondents are in *in* no manner re-

sponsible alleges that the amount above tendered was more
23 than was actually due from these defendants, and allege that on that date, to wit, the 13th of January, 1882, there was actually due by these respondent to libellant the sum of $1,278.01, or less, as will more fully appear by the stated and itemized account attached to this answer and marked Exhibit I.

Eighth. That after the India had delivered twelve hundred tons of iron rails to the lighters furnished by these respondents for the use of the said st-ship she was so lightened as to draw but thirteen feet aft and about twelve feet forward, and could have crossed the bar and with safety entered Galveston Bay, and the libellant, through his agents, having been requested so to enter and discharge the remaining five hundred tons and deliver the same to these respondents or their consignees, absolutely refused so to do, and the master of said S. ship India wilfully refused to enter Galveston Bay, to the great annoyance, delay, & expense of these respondents and the said master so remained in said roadstead until all of said cargo was discharged, excepting the two hundred and fifty tons of iron rails, which were retained, and intended to be retained, in the possession of libellants for the claim set forth in their said libel, and when in furtherance of such intention the said master had no difficult in entering said Galveston Bay and landing the said iron rails upon the wharf.

Ninth. That, according to the charter-party exhibited in the libel, there is no contract for primage or agreement to pay the same included therein, and if the same is relied on by libel-
24 lant to the exclusion of said bill of lading, the said primage, amounting to £95 12s. 6d., or $459.00, cannot be made a proper charge against these respondents, nor are they liable to pay the same.

Tenth. That in addition to the amounts advanced by these respondents for and on behalf of libellant's st-ship — allege that by libellant's improperly retaining and removing from the wharf the said two hundred and fifty tons and placing the same in a private yard at a great distance—more than a mile—from any point of shipment by water, they will be put to great expense, to wit, $——, or more, in transporting and returning said iron rails to the wharf from which they were taken, and such other charges as may be necessary to forward said rails; alleges that all of such expenses, together with the amounts paid out for lighterage and to the watchman, as herein set forth, are proper offsetts, and asks that the same be allowed against the claim of libellant made in said libel. And these respondents are now, and ever have been, ready to pay such amounts as may be due upon the proper accounting between libellant and themselves, and now make a tender of the sum of $—— in satisfaction of libellant's claim.

Eleventh. That all and singular the premises are true.

Wherefore these respondents pray that this honorable court would be pleased to pronounce against the libel aforesaid and

to condemn the said libellant in costs and otherwise —
25 law and justice to administer in the premises.

WAUL & WALKER,
Proctors for Respondents.
POST, MARTIN & CO.,
By J. O. KISHPAUGH, *Ag't.*

District Court, Eastern District of Texas.

And John O. Kishpaugh, being sworn, says he is the agent for the said Post, Martin & Co.; that all and each of the members of said firm are absent from this district, residing in the State of New York, and that the matters & things therein set forth are true to the best of his knowledge & belief.

JOHN O. KISHPAUGH.

Sworn to & subscribed before me this 3rd day of April, A. D. 1882.

[SEAL.] GEO. C. RIVES,
Cl'k U. S. Dist. Court, E. D. T., G.

GALVESTON, *Jan'y 13th*, 1882.

Post, Martin & Co. to Steamship India, Dr.

For freight on 10,964 iron rails, weighing 1,700 tons 2 qrs. 14 lbs., @ 22.d. 6 per ton	£1,912 10 8	
By advance, £927 11 3. Add 3% for interest and insurance, £956 5 4	956 5 4	
Bal., @ $4.80, £ sterling	£956 5 4	= 4,590 00
By amount paid lighterage		3,361 99
26 $100.00 deposited with collector, for service of night officer, less amount returned		$50 00
		3,311 99

By expense of transporting and replacing 250 tons on wharf and proximate wharfage on same.

Endorsements: "A. D. 528." "Edward Carr, owner of steamship India, *v.* Austin & Northwestern Railroad Company." "Answer & intervention of Post, Martin & Co." "Filed April 3rd, 1882. Geo. C. Rives, clerk."

Stipulation of Claimant to Abide the Decree. Filed Ap'l 4, '82.

District Court of the United States of America, Eastern District of Texas. In Admiralty.

EDWARD CARR, Owner of the Steamship India,
vs.
THE AUSTIN & N. WESTERN RAILROAD COMPANY. } No. 528.

Whereas a libel was filed in this court on the 23rd day of March,

in the year of our Lord one thousand eight hundred and eighty-two, by Edward Carr, owner of the steamship India, against The Austin & Northwestern Railroad Company for the reasons and causes in said libel mentioned, and a claim has been filed by Post, Martin & Co., of New York, and the said claimant and H. W. Moeller, A. Bertram, H. W. McNeill, and Wm. Bruegerhoff, his sureties, the parties hereto, hereby consenting and agreeing that, in
27 in case of default or contumacy on the part of the claimant or his sureties, execution may issue against their goods, chattels, and lands for the sum of eight thousand dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned are, and each of them is, bound in the sum of eight thousand dollars, conditioned that the claimant above named shall abide by and pay the money awarded by the final decree rendered in the cause by this court, or, in case of appeal, by the appellate court.

H. W. MOELLER,
WM. BRUEGGERHOFF,
POST, MARTIN & CO., [SEAL.]
By WAUL & WALKER,
Att'ys-in-Fact.
J. A. RHOMBERG. [SEAL.]
H. W. McNEILL. [SEAL.]
R. BERTRAM. [SEAL.]

Taken and acknowledged this 31st day of March, 1882, before me.
GARDNER RUGGLES,
U. S. Commissioner, W. D. T.

UNITED STATES OF AMERICA, }
Western District of Texas, } *ss:*

H. W. Moeller, R. Bertram, H. W. McNeill, and Wm. Bruegger-hoff, parties of the above stipulation, being duly sworn, depose and say, each for himself, that he is worth the sum of eight thousand dollars over and above all his just debts and liabilities.

[Seal United States Commissioner, W. D. T.]

GARDNER RUGGLES,
U. S. Commissioner, W. D. T.

Sworn to before me this 31st day of March, 1882.
28 GARDNER RUGGLES,
U. S. Commissioner, W. D. D.

Approved:
AMOS MORRILL,
Dist. Judge.

Endorsements: "A. D. No. 528. Edward Carr, owner of S. S. India, *vs.* Austin & N. Western Railroad Co." "Stipulation of claimant to abide decree." "Filed 4th day of April, 1882. Geo. C. Rives, clerk, by C. Dart, dep't."

Order from minutes. March term, April 6th, 1882.

District Court of the United States, Eastern District of Texas. Admiralty.

EDWARD CARR, Owner of the Steamship "India,"
vs.
THE AUSTIN & NORTHWESTERN RAILROAD CO. } No. 528.

Whereas Post, Martin & Co., of the State and city of New York, having filed their claim, under oath, in accordance with law and the rule in that behalf, to sixteen hundred and five bars of iron rails, weighing two hundred and fifty tons, a portion of the cargo of the steamship India, in the possession and detained by J. Möller, agents of said steamship, to answer the libel of the said Edward Carr filed in this honorable court, to enforce a lien for freight, demurrage, and other expenses incident thereto, in all amounting to the sum of six thousand four hundred and $\frac{36}{100}$ dollars against said rails.

And said Post, Martin & Co. having prayed the court to decree a restitution of the said two hundred and fifty tons of iron
29 rails, and having tendered a bond in the sum of eight thousand dollars, conditioned as required by law, which bond is approved:

Wherefore it is ordered that the said iron be released, the bond being a substitute therefor.

Answer. Filed April 6th, 1882.

To the Hon. Amos Morrill, judge of the district court of the United for the eastern district of Texas:

The answer of the Austin and Northwestern Railroad Company, intervening for such interest as they may have in sixteen hundred and five bars of iron rails, to the libel of Edward Carr, owner of the steamship India, answers and alleges as follows:

First. That this respondent is ignorant of the matters and things contained in the several articles of the said libel and have no personal knowledge of the same and cannot say whether the same are true or false, and insist upon full proof of the same if any interest this respondent may have in the same is to be affected thereby.

Second. That this respondent is informed and believes that the said sixteen hundred and five bars of iron rails is part of a purchase of iron rails contracted with Edward Samuels & Co., of Philadelphia, and this respondent, to be delivered on vessels in Galveston Bay, Texas (free from lighterage or other expense to this respondent); that the said iron rails were in transit to the city of Austin, State of Texas, when retained and held by the libellant, and that this respondent has no property therein until delivered to respond-
30 ent in said city of Austin, and that the right of possession and property in said iron rails remains in Post, Martin & Co., the holders of the bill of lading containing said sixteen hundred

and five iron rails, and who have asserted their right thereto by their claim filed in this case.

Third. That this respondent has read the claim and answer of said Post, Martin & Co., and upon information believes the same to be true and adopts the same so far as it may be relevant to any interest of this respondent, and, disclaiming any other right to said property than is herein set forth, prays that this respondent be dismissed with its reasonable costs.

THE AUSTIN & NORTHWESTERN RAILROAD COMPANY.

WAUL & WALKER,
Proctors for Respondent.

EASTERN DISTRICT OF TEXAS:

And Joseph A. Rhomberg, being duly sworn, says that he is the president of the Austin and Northwestern Railroad Company, the above-named respondent; that deponent has heard the foregoing answer read and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters this deponent believes the same to be true.

AUSTIN — NORTHWESTERN R. R. CO.,
J. A. RHOMBERG, *Prest.*

31 Sworn to and subscribed before me by Joseph A. Rhomberg March 30th, 1882.

GEO. C. RIVES, *Clerk*, [SEAL.]
By C. DART, *Dep't.*

Endorsements: "In adm. No. 528. Edward Carr, owner S. S. India, *v.* The Austin and Northwestern R. Road Co. Answer. Filed April 6th, 1882. George C. Rives, clerk, by C. Dart, dep't. W. & W., proctors."

Affidavit & Motion for Rule to Show Cause v. J. Möller. Filed Ap'l 7, 1882.

U. S. District Court, Eastern District of Tex.

EDWARD CARR, Owner of S. S. India,
v.
AUSTIN & N. WESTERN R. R. Co. } No. 528.

To the Hon. Amos. Morrill, judge, &c.:

The petition of Post, Martin & Co., claimants in the above cause, respectfully shews that on the 23rd day of March, 1882, they intervened in the above cause and claimed the two hundred and fifty tons of iron rails held by J. Möller & Co., agents of the libellants in the above suit, and prayed for the restitution of the same; that thereupon your honor ordered that the said prayer of your petitioners should be granted upon your petitioners entering into bond,

with security, in the amount of eight thousand dollars to abide by the event of said suit; that thereupon your petitioners furnished the said bond and stipulation in said cause, whereupon your honor ordered that the said iron rails be released, and that the said
32 bond stand in place of said iron rails; all of which appears by the records of this honorable court. Petitioners further shew that on this the seventh day of April, 1882, your petitioners, through their agent, J. O. Kishpaugh, presented the said order to J. Möller, of the firm of J. Möller & Co., the said order being a certified copy from the minutes of this court, and requested of the said Möller a release of said two hundred & fifty tons of iron rails, but that the — Moeller refused to release said iron or to deliver the same to your petitioners' agent; that afterwards on the same day your petitioners, through their agent, J. O. Kishpaugh, applied to said Moeller for the said order, which had been left in his possession with the request that he would state in writing his objection to complying with the order of this honorable court; that said Moeller replied that he had placed said order in the possession of his counsel, and refused to give any reason in writing for his refusal to obey said order, only stating that his attorneys intended to make a motion to set aside said bond, or something to that effect.

In consideration of the premises your petitioners pray that a rule to show cause be made against the said Moeller why he should not be punished for contempt in refusing to obey the order of this honorable court.

POST, MARTIN & CO.,
Per J. O. KISHPAUGH, *Ag't.*
WAUL & WALKER,
For the Motion.

33 Sworn to and subscribed before me by J. O. Kishpaugh this 7th day of April, 1882, and the said Kishpaugh, on his oath, further states that he is the agent of the said Post, Martin & Co., and as such agent is duly authorized to make this affidavit.

GEO. C. RIVES, *Clerk,*
By C. DART, *Dep't.*

Let the order requested be issued.
April 7, '82.

AMOS MORRILL,
Dist. Judge.

Endorsements: "A. D. 528. Edward Carr, owner of the steamship India, *v.* Austin & Northwestern Railroad Co. Affidavit & motion for rule to show cause *v.* J. Möller. Filed April 7, 1882. Geo. C. Rives, c'l'k, by C. Dart, dep't. Iss'd writ for J. Möller to show cause, Ap'l 7th, 1882, ret'ble Ap'l 8, '82, at 10 o'clock a. m.

Writ to Show Cause. Issued & Filed Ap'l 7, '82.

In the United States District Court for the Eastern District of Texas, at Galveston. In Admiralty.

EDWARD CARR, Owner of the Steamship India,
v.
AUSTIN & NORTWESTERN RAILROAD COMPANY. } No. 528.

34 The President of the United States of America to the marshal of the eastern district of Texas, Greeting:

You are hereby commanded to summon J. Moller, of the firm of J. Moller & Co., to be and appear before the honorable district court of the United States, at the court-house thereof in the city of Galveston, on the 8th day of April, A. D. 1882, at 10 o'clock a. m, to show cause, if any he can, why he should not be punished for contempt in refusing to obey the order of this court made & entered on the 6th day of April, 1882, in the above entitled and numbered cause, and you will serve the said J. Moller with the accompanying certified copy of this writ.

Herein fail not, and due return of this writ make.

Witness the Honorable Amos Morrill, judge of said court, and the seal thereof, at Galveston, this 7th day of April, A. D. 1882.

[SEAL.] GEO. C. RIVES, *Clerk.*

Came to hand April 7, 1882, and executed same day, by delivering to the within-named J. Möller in person, in the city of Galveston, a true copy of this writ, certified by the clerk of this court.

W. J. PHILLIPS,
U. S. Marshal, E. D. T.,
By H. H. KIRKPATRICK, *Deputy.*

35 Endorsements: "A. D." "528." "Edward Carr, owner of the steamship India, *v.* Austin & Northwestern Railroad Comp'y." "Writ to show cause." "Iss'd April 7, 1882. Geo. C. Rives, cl'k." "Returned and filed April 7th, 1882. Geo. C. Rives, cl'k."

From Minutes. April 8th, 1882. March Term.

EDWARD CARR, Owner of the Steamship "India,"
v.
AUSTIN & NORTHWESTERN RAILROAD COMPANY. } 528.

This day came on to be heard the motion of Post, Martin & Co., the claimants in this cause, for a rule to show cause against J. Möller why he should not be punished for contempt in refusing to obey the order of this court entered in this cause on the 6th day of April, 1882, and the said J. Möller appearing in his own proper person and attended by his counsel, and the court having heard the evidence in respect to said motion, it is considered and ordered by the court that the said order of this court, entered on the 6th day of April, 1882, in this cause, be enforced and obeyed, and the said J. Möller, in

whose possession the iron mentioned in said order is, be, and he is hereby, required to comply with said order. It is further ordered that the said motion for a rule to show cause be granted, and the further consideration of the rule is postponed until Monday next.

36 From Minutes. March Term. April 10th, 1882.

EDWARD CARR, Owner of the Steamship "India,"
v.
AUSTIN & NORTHWESTERN RAILROAD CO. } 528.

J. Möller, against whom a rule to show cause has been entered, and having appeared in open court, and having purged himself of any wilful contempt in not obeying the order of this court, and having complied with the order of this court, the rule to show cause entered against him is hereby dismissed at his costs, and it is considered by the court that the claimants, Post, Martin & Co., have and recover from the said J. Möller all costs incurred by reason of the said rule, and have execution therefor.

From Minutes. March Term. April 20th, 1882.

EDWARD CARR
v.
AUSTIN AND NORTHWESTERN RAILROAD COMPANY. } 528.

This cause being called this day, and both parties announcing ready, by agreement the cause is set down for hearing on Saturday next.

Amended Libel. Filed April 22, 1882.

District Court of the United States for the Eastern District of Texas in a Cause of Contract, Civil and Maritime.

EDWARD CARR, Owner of the Steamship India,
vs.
AUSTIN & NORTHWESTERN RAILROAD COMPANY. } No. 528.

Leave of the court — first asked and obtained, libellant files the the following count in addition to those contained in the
37 original libel, and alleges as follows:

That respondent, refusing to pay said freight money and demurrage, caused libellant to hold said sixteen hundred and five bars of iron rails in order to enforce the said lien and put libellant to the expense of lightering said sixteen hundred and five bars from said steamship to Galveston wharf, to wit, in the sum of five hundred and sixty-two $\frac{50}{100}$ dollars, paid Adone & Lobit, agents for the lighters, as is set forth in the bill hereto annexed, marked G, notwithstanding the stipulation in said charter-party that said cargo is to be taken from alongside said steamship, and all of which is within the admiralty and maritime jurisdiction of the eastern district of Texas and of this honorable court.

J. Möller, being sworn, says that he is the agent of Edward Carr, the libellant above named; that said libellant is absent from the district, being, as deponent believes, in Hamburg, Germany; that the above count is true according to the best of his knowledge and belief.

J. MOLLER.

Sworn to & subsc'd before me April 22, 1882.

GEO. C. RIVES, *Cl'k*,
By C. DART, *Dep't.*

EXHIBIT "G."

GALVESTON, *Jan'ry 13th*, 1882.

38 Steamship India owners to lighters Laura & Bessie. Office on Kuhn's wharf.

For lighterage of R. R. iron from anchorage, lighters "Laura & Bessie:"

1,170 bars, 181.23 tons, @ $2.25		407 79
435 " of Irvine & B., 68.77 tons, @ $2.25		154 71
		$562 50

Received payment,

ADONE & LOBIT, *Ag'ts*,
P'r J. M.

Endorsements: "A. D. 528. Edward Carr *v.* Austin & Northwestern Railroad Co. Amended libel. Filed Ap'l 22, 1882. Geo. C. Rives, cl'k, by C. Dart, dep't."

Decree.

From Minutes. March Term. April 22, 1882.

District Court of the United States, Eastern District of Texas.
Admiralty.

EDWARD CARR, Owner of the Steamship "India,"
v.
THE AUSTIN AND NORTHWESTERN RAILROAD COMPANY. } No. 528.

On this 22nd day of April, 1882, came the libellant herein, by his proctors, and, upon application, leave is given the libellant to amend, and the amendment filed. And the respondent herein, The Austin and Northwestern Railroad Company, also the intervenors herein, Post, Martin & Co., of the city of New York, appearing by their proctors respectively, and the issues being joined, and all
39 parties commencing ready for a final hearing, and the court having heard the pleadings and the evidence and argument of counsel, upon due consideration thereof, the courts finds from the testimong herein that there is due and owing to the libellant herein, upon the contract sued on and bill of lading set forth in the libel, a balance for freight of the sum of £984 19s. 5d., English

sterling, amounting in United States currency to the sum of $4,793.35, with interest thereon from the 9th day of January, 1882, the time when the same became due and payable, to this date, at the rate of six per cent. per annum, $79.86, making, in the aggregate, the sum of $4,873.21 as the balance due this date on account of freight; that there is due and owing to the libellant, on account of primage, according to the said bill of lading, the sum of £95 12s. 6d., English sterling, amounting in United States currency to the sum of $465.35, with interest thereon from the 9th day of January, 1882, the time when the same became due and payable, to this date, at the rate of six per cent. per annum, $7.73, making the aggregate sum of $473.08 as the amount now due on account of primage; that there is due and owing to the libellant for demurrage—for 5 days' demurrage—at the rate of £35 per day, according to the contract, making the sum of £175, English sterling, amounting in United States currency to the sum of $851.63, with interest thereon at the rate of six per cent. per annum from the 13th day of January, 1882, at the time when the same became due and payable, to this
40 date, $13.87, making in the aggregate the sum of $865.50 as the amount due on account of the demurrage. And the court further finds that there is due and owing the libellant, for the advances made by him on account of the property in his possession, which advances were legitimate and proper and fully set out in the libel, as follows: On Jan'ry 23d, 1882, the sum of $28.50; on Jan'y 26th, 1882, the sum of $27.00; on Jan'ry 20th, 1882, the sum of $75.00; on Jan'ry 25th, 1882, the sum of, $250.00 and on Jan'ry 13th, 1882, the sum of $562.50 with interest thereon from the time the advances were made to this date upon the said several advances, at the rate of 6% per annum, $14.58, making the aggregate sum so due and owing the libellant herein, by reason of the demands sued on in this suit, with the interest thereon to this date, the sum of seven thousand one hundred and sixty-nine $\frac{37}{100}$ dollars ($7,169.37).

And it further appearing to the court from the pleadings and the testimony that the libellant retained in his possession two hundred and fifty tons of railroad iron, in the carrying and custody and care of which his claim sued on herein in part accrued, asserting his lien thereon for the payment of the said claim, and submitting the said two hundred and fifty tons of railroad iron to the jurisdiction of this court in this cause, and that this court has jurisdiction thereof:

Wherefore it is considered and adjudged by the court that the libellant has *has* a lien on the said railroad iron for the
41 payment of the several sums herein found due him, and is entitled to have the same foreclosed in this suit and sold for the payment and satisfaction of said indebtedness; but it appearing to the court that the claimants of the said railroad iron, the said Post, Martin & Co., of the city of New York, in accordance with law and the orders of this court, have taken the said railroad iron out of the possession of the libellant and out of the jurisdiction of this court by executing and filing a stipulation with sureties, duly approved, by reason whereof the said iron cannot now be ordered to be sold for

the purpose aforesaid, and that said stipulation remains in this court in lieu of and in the place of said railroad iron:

Wherefore it is now considered and adjudged by the court that the libellant herein have and recover from the said Post, Martin & Co., and from the sureties upon their said stipulation, J. A. Rhomberg, H. W. McNeill, R. Bertram, H. W. Moeller, and Wm. Brueggerhoff, the said sum of seven thousand one hundred and sixty-nine dollars and thirty-seven cents, and also all costs about this suit incurred, and have execution therefor.

Allowing Appeal.

From minutes. March term. April 25, 1882.

EDWARD CARR, Owner of the Steamship "India,"
v.
AUSTIN AND NORTHWESTERN RAILROAD COMPANY. } 528.

This day came Post, Martin & Co., of the city of New York,
42 intervenors herein and claimants, by their proctor, T. N. Waul, and gave notice of appeal from the decree of this court in this cause to the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, which appeal is allowed and to be perfected on or before the 10th day of June next.

Appeal. Filed May 12, '80.

Dist. C't, East'n Dist. of Texas.

EDWARD CARR, Owner St. Sh. India, Libellant,
v.
AUSTIN & NORTHWEST- RAILROAD CO., Respondent,
and POST, MARTIN & CO., Claimants. } A. D. 528.

To the honorable the circuit court of the United States for the eastern district of Texas, holding its sessions at Galveston:

The appeal of Henry A. V. Post, Archer N. Martin, and Charles C. Pomeroy, composing the firm of Post, Martin & Co., claimants in the above cause, shews that on the 25th of April, 1882, came on to be heard before the Honorable Amos Morrill, judge of said district court, upon the testimony and proofs adduced by the respective parties, and the said judge having rendered a decree therein that the libellant recover of the said claimants and their sureties on their stipulation filed in the cause the sum of seven thousand one hundred and sixty-nine dollars and thirty-seven cents and all costs of suit.

And these appellants are advised and insist that said de-
43 cree is erroneous, inasmuch as the libellant was not entitled to recover said sum without an allowance of the various claims set up by claimants to the demand in libellant's libel.

And these appellants, for these and other reasons, appeal from the whole of said decree in favor of libellant to the next circuit court to be held in said district, and on said appeal they intend to make new allegations in the circuit court, and introduce the same and new

and further proofs, and they pray that the said decree may be reversed with costs, or such other decree thereupon made as to the circuit court may seem just, and that the said appellees be condemned to pay to these appellants their costs and damages in the premises.

WAUL & WALKER,
Proctors for Appellants.

Endorsements: "No. 528." "Edward Carr, owner of st. sh. India, *v.* A. & N. W. R. R. Company and Post, Martin & Co., claimant." "Appeal." "Filed May 12th, 1882. Geo. C. Rives, cl'k." "Waul & Walker, proctors."

From minutes U. S. circuit court. Nov'r term. November 15, 1882.

EDWARD CARR, Libellant, Appellee,
v.
AUSTIN & NORTHWESTERN R. R. Co. } 1196. On Appeal.

Before Hon. Don A. Pardee, U. S. circuit judge.

On this day came the parties to this suit, by their counsel, respectively, and thereupon a hearing of the cause was had
44 before the court and submitted.

Opinion Rendered Nov. 16th, 1882.

United States Circuit Court, Fifth Judicial Circuit, Nov'r Term, Eastern District of Texas. In Admiralty.

Don A. Pardee, judge.

EDWARD CARR, Owner, etc., Steamship "India,"
v.
AUSTIN & NORTHWESTERN RAILROAD COMPANY and POST, MARTIN & Co., Claimants. } On Appeal.

The facts of the case are substantially as propounded in the libel and amended libel, the amount due for freight being the only material fact overstated, £956 5s. 4d. being the true amount unpaid, and not £1,080 11s. 11d., as claimed. Besides this fact the only other fact contested is whether or not Post, Martin & Co., claimants and assignees of the bill of lading, had notice of the charter-party in pursuance of which the bill of lading was issued.

The evidence on this point is sufficient to establish the fact of notice. Leaving out of the question the recitals on the face of the bill of lading showing the shipment of an entire cargo of railroad iron, such goods as would be likely to suggest lighterage and demurrage, etc., the two facts undisputed and unexplained—(1) of the prepayment of one-half of the freight, less interest and in-
45 surance endorsed on the back of the bill of lading, (2) and of the consignee's instructions to his agent prior to the arrival of the ship to furnish lighterage, taken with the fact that lighterage

was furnished by the claimant without question—are sufficient to satisfy me that the claimant who thus carried out the specifications of the charter-party in advance must have had notice of its existence and terms. On the construction of the charter-party there is only one question raised, and that is whether under its provisions the consignees were required to furnish lighterage if necessary at the port of destination. The clause in the charter-party in relation to lighterage is in these words:

"That the said ship being tight, staunch, and strong and every way fitted for the voyage shall with all possible dispatch sail and proceed to Middlebro-on-Tees, where ordered by the charterers, but where she can lay always afloat, or so near thereto as she may safely get, and there load from the factors of affreighters a full and complete cargo of rails, say 1,700 to 1,800 tons, at owner's option, not exceeding 30 ft. in length, which is to be brought to and taken from alongside at merchant's risk and expense, and free of lighterage to the ship, etc., and being so loaded shall therewith proceed to Galveston Bay, or so near thereto as she may safely get," etc.

A plausible argument is made that the lighterage therein referred to relates only to the lighterage necessary to take the cargo on board, and not to the lighterage that might be necessary in discharging cargo.

46 It would have been strange indeed if the parties in making a charter-party with as many details as this one under consideration has, and when contracting specifically in relation to lighterage, had been silent as to that question, leaving it to custom when contracting for a cargo of railroad iron to the port of Galveston, where lighterage is so notoriously necessary; but I cannot take the narrow view of the clause in question claimed for it by the learned proctor.

It is stipulated that the cargo "is to be brought to and taken from alongside at merchant's risk and expense and free of lighterage to to the ship." The construction claimed would leave the words "and taken from alongside" absolutely surplusage, or would render it necessary to hold that when the merchant brought the cargo to the ship it was to be taken aboard and loaded at merchant's risk and expense, which was obviously not the intent nor contract of the parties.

On the question of primage, which has been argued and seems to have been allowed in the district court, I find it is only claimed in the libel in the guise of freight, although specified in the bill attached to the libel as primage. The charter-party, as has been found, constituted the contract between the parties, and as that makes no mention of primage none can be allowed, although it was stipulated in the bill of lading. Primage is [no] longer a gratuity to the master unless specially stipulated, but it belongs to the owners or freighters,

47 and is nothing but an increase of the freight rate. The charter-party fixes the rate for freight and the bill of lading given thereunder cannot enhance it.

The case, then, as it appears to me, entitles the libellant to a decree in his favor for the following amounts, to wit:

For ½ freight money unpaid, £956 5s. 4d., reduced to United States currency at 4.80, agreed rate, making $4,590.08, with interest thereon from January 9th, 1882, at six per cent.; for 5 days' demurrage, at £35 per day, or £175, reduced to U. S. currency at $4.80, agreed rate, making $840.00, with interest thereon at six per cent. from Jan'ry 13th, 1882; for charges paid on freight in landing and caring for same, etc., to wit:

Watchmen, $28.50 & 27.00	$55 50
Wharfage	75 00
Hauling & storing	250 00
Lighterage	562 50
Amounting to	$943 00

Upon which interest at six per cent. should be allowed from date of payment, say January 26th, 1882, when last payment was made, so far as dates are shown. And as the property libelled and on which libellant had a lien for his demand has been released and delivered to the claimants, Post, Martin & Co., on bond to stand in place of the property, the decree should be against the claimants and their sureties on the release bond for the amounts as above found due.

48 The costs of the district court should be borne by the claimants, but, as the decree of that court has been reduced, the costs on appeal should be borne by the libellant and appellee.

A decree in accordance with these views will be entered.

DON A. PARDEE,
Circuit Judge.

Certificate of Clerk to Opinion.

In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, at Galveston, Texas.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the opinion of the court, Hon. Don A. Pardee, U. S. circuit judge, presiding, rendered Nov'r 16th, 1882, in cause No. 1196 on the appeal docket of said court, entitled Edward Carr, owner of the steamship "India," *v.* Austin & Northwestern Railroad Company [and] Post, Martin & Co., claimants, as the same now appears in my office, the original of the said opinion being forwarded to said judge and this copy retained and filed in said cause in lieu and place of said original.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 4th day of December, A. D. 1882.

[SEAL.] C. DART,
Clerk U. S. Circuit Court, E. D. T., at Galveston.

49 Endorsements: "C. L. No. 1196." "Edward Carr, owner steamship India, *vs.* Austin & N. W. R. R. Co. & Post, Martin & Co., compl'ts." "Copy of the opinion of Judge Pardee, rendered Nov. 16, 1882." "Filed Dec'r 4, 1882. C. Dart, clerk, by W. L. Hanscom, deputy."

Decree.

From minutes circuit court. Nov'r term. Nov'r 16, 1882.

In the Circuit Court of the United States for the Eastern District of Texas, in the 5th Circuit. In Admiralty.

EDWARD CARR, Owner of the Steamship "India," *vs.* AUSTIN & NORTHWESTERN RAILROAD COMPANY and POST, MARTIN & Co., Claimants. } No. 1196. On Appeal.

This cause came on to be heard at this term, the libellant and appellee appearing by his proctors, and the respondents and appellants, Post, Martin & Co., intervenors and claimants in this cause, appearing by their proctors, and the parties hereto announcing — ready for final hearing, and the court having heard the pleadings and the evidence and argument of counsel, upon consideration thereof it is considered, adjudged, and decreed as follows, to wit: The court finds from the evidence that the libellant is entitled to

50 a decree in his favor for and on account of the claims sued on in this suit, as follows:

For ½ freight money unpaid, £856 5s. 4d., reduced to United States currency at 4.80, agreed rate, making $4,590.08, with interest thereon from January 9th, 1882, at six per cent. per annum, to this date, $232.32, making in the aggregate the sum of $4,822.40.

For 5 days' demurrage at £35 per day, or £175, reduced to U. S. currency at $4.80, agreed rate, making $840.00, with interest thereon at six per cent. per annum from January 13th, 1882, $42.00, making in the aggregate the sum of $882.00.

For charges paid on freight in landing and caring for same, etc., to wit:

Watchman, $28.50 & $27.00	$55 50
Wharfage	75 00
Hauling & storing	250 00
Lighterage	562 50
Amounting to	$943 00

With interest at six per cent. per annum January 26th, 1882, $45.53, making in the aggregate the sum of $988.53, making the aggregate of all said sums so found due and owing the libellant herein the sum of six thousand six hundred and ninety-two $\frac{93}{100}$ dollars ($6,692.93).

And it appearing to the court that the property libelled, and on which libellant had a lien for his demand, has been released and delivered to the claimants, Post, Martin & Co., on bond, to stand in place of the property:

51 It is therefore further considered, adjudged, and decreed by the court that the libellant herein, Edward Carr, have and recover from the said Post, Martin & Co. and from the sureties upon their said stipulation, J. A. Rhomberg, H. W. McNeill, R. Bertram, H. W. Moeller, and Wm. Brueggerhoff, the said sum of six thousand six hundred and ninety-two $\frac{93}{100}$ dollars ($6,692.93), and have execution therefor.

It is further considered by the court that the costs in the district court be paid by the claimants and that the costs of the appeal be paid by the libellant, for which execution may issue against them, respectively.

It is further considered that all other and further demands sued on herein than is hereby allowed be, and are hereby, disallowed.

From which decree and rulings of the court the claimants, Post, Martin & Co., give notice in open court and ask leave to appeal to the Supreme Court of the United States, which appeal is granted upon condition that within sixty days said claimants enter into bond, with security to be approved according to law, in the penalty of two thousand five hundred dollars, to pay all such amounts, interest, damages, and costs as may be awarded by the Supreme Court.

Nov. 16, 1882.

DON A. PARDEE,
Circuit Judge.

52 *Draft of Decree, Enrolled and Signed by the Judge. Filed Nov. 16th, 1882.*

In the Circuit Court of the United States for the Eastern District of Texas, in the 5th Circuit. In Admiralty.

EDWARD CARR, Owner of the Steamship "India,"
vs.
AUSTIN & NORTHWESTERN RAILROAD COMPANY and POST, MARTIN & Co., Claimants.

No. 1196.
On Appeal.

This cause came on to be heard at this term, the libellant and appellee appearing by his proctors, and the respondents and appellants, Post, Martin & Co., intervenors and claimants in this cause, appearing by their proctors, and the parties hereto announcing — ready for a final hearing, and the court having heard the pleadings and the evidence and argument of counsel, upon consideration thereof it is considered, adjudged, and decreed as follows, to wit:

The court finds from the evidence that the libellant is entitled to a decree in his favor for and on account of the claims sued on in this suit, as follows:

For ½ freight money unpaid, £956 5s. 4d., reduced to United States currency at 4.80, agreed rate, making $4,590.08, with interest thereon from January 9th, 1882, at six per cent. per annum to this date, $232.32, making in the aggregate the sum of $4,822.40; for 5 days' demurrage, at £35 per day, or £175, reduced to U. S. cur-
53 rency at $4.80, agreed rate, making $840.00, with interest thereon at six per cent. per annum from January 13th, 1882, $42.00, making in the aggregate the sum of $882.00.

For charges paid on freight in landing and caring for same, etc., to wit:

Watchman, $28.50 & $27.00	$55 50
Wharfage	75 00
Hauling & storing	250 00
Lighterage	562 50
Amounting to	$943 00

With interest at six per centum per annum from *from* January 26th, 1882, $45.53, making in the aggregate the sum of $988.53, making the aggregate of all said sums so found due and owing the libellant herein the sum of six thousand six hundred and ninety-two $\frac{93}{100}$ dollars ($6,692.93).

And it appearing to the court that the property libelled, and on which libellant had a lien for his demand, has been released and delivered to the claimants, Post, Martin & Co., on bond to stand in place of the property, it is, therefore, further considered, adjudged, and decreed by the court that the libellant herein, Edward Carr, have and recover from the said Post, Martin & Co., and from the sureties upon their said stipulation, J. A. Rhomberg, H. W. McNeill, R. Bertram, H. W. Moeller, and Wm. Brueggerhoff, the said sum of six thousand six hundred and ninety-two $\frac{93}{100}$ dollars ($6,692.93) and have execution therefor.

54 It is further considered by the court that the costs in the district court be paid by the claimants and that the costs of the appeal be paid by the libellant, for which execution may issue against them respectively.

It is further considered that all other and further demands sued on herein than is hereby allowed be, and are hereby, disallowed.

From which decree and rulings of the court the claimants, Post, Martin & Co., give notice in open court and ask leave to appeal to the Supreme Court of the United States, which appeal is granted upon condition that within sixty days said claimants enter into bond, with security to be approved according to law, in the penalty of two thousand five hundred dollars, to pay all such amounts, interest, damages, and costs as may be awarded by the Supreme Court.

Nov. 16, 1882.

DON A. PARDEE,
Circuit Judge.

Endorsements: 1196. On appeal. Edward Carr *vs.* Austin & Northwestern R. R. Co. *et al.* Decree. Filed Nov. 16, 1882. C. Dart, clerk.

55 *Appeal Bond to U. S. Supreme Court. Filed Jan'ry* 13, 1883.

Know all men by these presents that we, Henry A. V. Post, Archer N. Martin, and Charles C. Pomeroy, merchants, doing business in the city of New York and State of New York under the firm name of Post, Martin & Co., and J. A. Rhomberg, H. W. McNeill, R. Bertram, H. W. Moeller, & Wm. Brueggerhoff, of the county of Travis

and State of Texas, as principals, and W. L. Moody and L. F. Moody, as sureties, are held and firmly bound unto Edward Carr, owner of the steamship "India," in the full and just sum of two thousand five hundred dollars ($2,500.00), to be paid to the said Edward Carr, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of January, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately, at a regular term of the circuit court of the United States in and for the eastern district of Texas, in the fifth circuit, holding sessions at Galveston, in a suit depending in said court in admiralty, on appeal, between Edward Carr, owner of the steamship "India," libellant and appellee, and the Austin & Northwestern Railroad Company [and] Post, Martin & Co., claimants, the said Post, Martin & Co. being the appellants, a final judgment and decree was rendered on the 16th day of November, 1882, against the said
56 Post, Martin & Co., claimants, and against the said J. A. Rhomberg, H. W. McNeill, R. Bertram, and H. W. Moeller and Wm. Brueggerhoff, the sureties, upon their stipulation for the sum of six thousand six hundred and ninety-two $\frac{93}{100}$ dollars ($6,692.93) and costs in the district court.

And whereas said decree further recites: "From which decree and rulings of the court the claimants, Post, Martin & Co., give notice in open court and ask leave to appeal to the Supreme Court of the United States, which appeal is granted upon condition that within sixty days said claimants enter into bond, with security to be approved according to law, in the penalty of two thousand five hundred dollars, to pay all such amounts, interest, damages, and costs as may be awarded by the Supreme Court:"

Now, the condition of the above obligation is such that if the said Post, Martin & Co. shall prosecute their suit to effect and pay all such amounts, interest, damages and costs, as may be awarded by the Supreme court if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

POST, MARTIN & CO., [L. S.]
By their att'ys, WAUL & WALKER. [L. S.]
HENRY A. N. POST, [L. S.]
By his att'ys, WAUL & WALKER.
ARCHER N. MARTIN, [L. S.]
By his att'ys, WAUL & WALKER.
CHARLES C. POMEROY, [L. S.]
57 By his att'ys, WAUL & WALKER.
J. A. RHOMBERG, [L. S.]
By A. P. WOOLDRIDGE, *His Att'y.*
H. W. McNEILL, [L. S.]
By A. P. WOOLDRIDGE, *His Att'y.*
R. BERTRAM. [L. S.]
H. W. MOELLER. [L. S.]
WM. BRUEGGERHOFF. [L. S.]
W. L. MOODY. [L. S.]
L. F. MOODY. [L. S.]

Sealed and delivered in presence of—

_____ _____.

Acknowledged before me by T. N. Waul, of the firm of Waul & Walker, as att'y for and on behalf of Post, Martin & Co.; Henry A. N. Post, Archer N. Martin, and Charles C. Pomeroy, this 8th day of January, 1883.

[SEAL.] C. DART,
U. S. Com'r East'n Dist. Texas, at Galveston.

Approved by—
DON. A. PARDEE,
Circuit Judge.

Jan'ry 12th, 1883.

UNITED STATES OF AMERICA, *Eastern District of Texas:*

On this the 8th day of January, A. D. 1883, personally appeared before me the above-named W. L. Moody and L. F. Moody, by
58 me known to be the persons described in and who executed the foregoing instrument, and severally acknowledged the execution thereof.

Given under my hand and seal of office on the day and date above written.

[SEAL.] C. DART,
U. S. Commissioner, East'n Dist. Texas, at Galveston.

UNITED STATES OF AMERICA, *Eastern District of Texas:*

On this day personally appeared before me W. L. Moody and L. F. Moody, who, being severally by me duly sworn, each for himself doth depose and say that he is a resident and freeholder within the State of Texas and the eastern district of Texas, and that he is worth two thousand five hundred dollars over and above all his just debts and liabilities which he owes or has incurred and in property not exempt from execution.

W. L. MOODY.
L. F. MOODY.

Sworn to and subscribed before me this 8th day of January, A. D. 1883. Witness my hand & official seal.

[SEAL.] C. DART,
U. S. Commissioner, East'n Dist. Texas, at Galveston.

59 Endorsements: "1196. On appeal. Edward Carr, owner of the steamship 'India,' *v.* Austin & Northwestern Railroad Company [and] Post, Martin & Co., claimants. Appeal bond to Supreme Court." Filed January 13, 1883. C. Dart, clerk, by W. L. Hanscom, deputy. I hereby certify that H. W. Moeller, A. Bertram, H. M. McNeill, and Wm. Brueggerhoff, the sureties on the original stipulation in this cause, in the district court, each justified in the sum of eight thousand dollars, the amount named in said stipulation. C. Dart, clerk U. S. circ't court, E. D. T., G."

60 In the Circuit Court of the United States for the Eastern District of Texas, in the Fifth Circuit, at Galveston, Texas.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and of all proceedings in cause No. 1196 on the appeal docket of said court, entitled Edward Carr, owner of the steamship "India," *v.* Austin and Northwestern Railroad Company [and] Post, Martin & Co., claimants, as the same now appears of record in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 12th day of June, A. D. 1883.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, E. D. T., at Galveston.

Endorsed on cover: E. Texas C. C. U. S. No. 198. Henry A. V. Post, Archer N. Martin, and Charles C. Pomeroy, composing the firm of Post, Martin & Company, appellants, *vs.* Edward Carr, owner of the steamship "India." Filed 1st November, 1883.

122-642

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

HENRY A. V. POST, *et al*, *Appellant*,
vs.
EDWARD CARR, *Appellee.*
No. 198.

APPEAL FROM THE CIRCUIT COURT FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEE.

I. The appellee being owner of the steamship "India," exhibited his libel in the Admiralty Court, to enforce his lien for freight and demurrage against a cargo carried on that vessel. The appellants intervened, averred title to the cargo, denied the right to demurrage, and set up a counter claim for the sum of $3,361.00, paid by them for lighterage of the cargo at the port of discharge.

The claim for freight is not disputed and the controversy relates only to the demurrage and counter claim.

The issues of fact were tried by the court, and the finding is as follows:

"The court finds from the evidence that the libellant is entitled to a decree in his favor, for and on ac-

count of the claims sued on in this suit, as follows: For freight, * * $4,882.40; for five days demurrage, * * $882; for charges on freight, in landing and caring for same, $988.53; making $6,692.93," for which a decree was entered, (fols. 52, 53).

This is a general finding; and the decree based upon it is not reviewable in this court.

An "*opinion*" was filed in this case which contains these words:

"The facts of the case are substantially as propounded in the libel and amended libel,—the amount due for freight being the only material fact overstated,—£956 5*s*. 4*d*. being the true amount unpaid, and not £1,080 11*s*. 11*d*. as claimed. Besides this fact the only other fact contested is whether or not Post Martin & Co., claimants and assignees of the bill of lading, had notice of the charter-party, in pursuance of which the bill of lading was issued. The evidence on this point is sufficient to establish the fact of notice," (fol. 44).

This court does not treat the opinion as part of the record.

It has held that where there is a general finding, and also a special finding, the case is not reviewable here.

Meath *vs.* The Board of Levee Commissioners, 109 U. S., 298.

If the opinion is to be regarded as a special finding of all the facts averred by libellant, it is sufficient to support the decree.

DEMURRAGE.

The pertinent facts alleged in the libel are in substance, as follows:

The owner of the S. S. India, and Frederick Edwards, as agent of the merchant, entered into a charter-party for the hire of the India. The captain was to sign bills of lading at any rate of freight, without prejudice

to the charter-party. One half of the freight was to be paid on signing the bills of lading. The vessel was to be discharged according to the custom of the port, but at not less than 250 tons per running day, Sundays and Government holidays excepted in both cases, commencing twelve hours after notice of readiness, and ten days on demurrage, over and above the said laying days at £35 per day, vessel to have an absolute lien upon the cargo for all freight—dead freight—and demurrage. On shipment of the cargo and payment of advance freight, and any demurrage incurred, charterers' liability was to cease. A bill of lading was signed containing these words:

"Shipped * * upon * the India, 1,700 tons of iron rails, * * to be delivered at the aforesaid port of Galveston Bay * unto order or to their assigns, paying freight for the said goods, *with conditions* *"

The bill of lading was endorsed as follows, by the captain:

"Received of Sanders Brothers the sum of £927 11*s*. 3*d*. for the use of the S. S. India and owners, which sum I request them to deduct from settlement of freight at Galveston Bay."

The appellants are assignees of the bill of lading: there is no finding that they are owners of the cargo.

The appellants took the cargo in small quantities, and at irregular times, capriciously and vexatiously, and caused an unjust detention of five days.

ARGUMENT.

First. A lien for demurrage is created by the contract.

This appears from the charter-party. As between the ship owner and the charterer, the former clearly has a lien on the latters goods.

Sanders Brothers, the shippers named in the bill of lading, paid in advance the one half of the freight, "for the use of the S. S. India" stipulated in the charter-party to be paid by the charterers in advance, and presumably are the charterers. They shipped the cargo, and the bill of lading was made to them, and the appellants took the goods only by their assignment. This being so, there is clearly a lien on the goods for demurrage. Being both charterers and shippers, the two contracts are to be construed together.

Kern *vs.* Des Sandes, 10 C. B., 205.

If it be assumed that Sanders Bros. are not charterers, but shippers only, the goods they shipped are subject to the lien by the terms of the contract contained in the bill of lading which adopts the charter-party, and by virtue of their knowledge of the charter-party.

The bill of lading expressly provides that the shippers are to pay freight for the said goods, "with conditions." The phrase "with conditions," is the customary phrase in bills of lading in referring to the charter-party, although the words "as per charter party," are usually added. They can have no meaning except as applied to the charter-party, and Sanders Bros. knowing of the charter-party, (if indeed they were not the charterers) could have only understood them in that sense. As appears by the charter-party, a lien for demurrage is one of its conditions. It follows that the shippers of cargo by express contract created a lien for demurrage.

Wegner *vs.* Smith, 15 C. B., 285.
See Gray *vs.* Carr, 6 L. R., 2 B. 322.

The cesser of the liability of the charterers in the shipment of the cargo, is a circumstance which strengthens this view.

The lien was not divested by the transfer of the bill of lading.

Small *vs.* Moates, 9 Bing., 579.

The question is not as to the personal liability of the consignees, arising out of the acceptance of the goods under the bill of lading. That is governed by different rules.

Second. Demurrage is due by operation of law, by the consignee, independently of the contract.

"The courts seem uniformly agreed that demurrage, or damage in the nature of demurrage, for unreasonable detention, is always payable by the consignee, if there has been, in fact, an unreasonable detention, even where it is not mentioned in the bill of lading or the document contains no demurrage clause."

Foard's Law of Merchant Shipping, 402.

By the maritime law a master has a lien upon the cargo for demurrage, and such a lien may be enforced in admiralty. This, although demurrage was not stipulated for the bill of lading. An ordinary bill of lading implies an agreement that the goods shall be received within a reasonable time after the arrival of the vessel at the port of destination.

2 Lowell's Decisions.

The Hyperion.

"Where a bill of lading is silent as to demurrage, and the vessel is unreasonably detained at the port of delivery before being unloaded, the shipper will be liable to the master sailing the vessel on shares, and having control of her employment, in an action of *assumpsit*, upon the implied contract that his vessel should be discharged in a reasonable time after arrival, for damages incurred, even though the bill of lading states that the cargo is to be discharged by the consignee with the assistance of the crew."

Hall *vs.* Barker, 54 Maine, 339.

The ship has a privilege against the cargo for damages in the nature of demurrage enforceable in admiralty, when the cargo has not been received within a reasonable time through the fault of the consignee, although the bill of lading contains no demurrage clause.

Donaldson *vs.* McDowell, 1 Holms, 290.

LIGHTERAGE.

The claim of a set off for lighterage is not sufficiently made in the pleadings. There is no contract averred on the part of the appellees to pay it, and there is no averment that the lighterage was paid at the request of the appellees. No consideration for any such payment is averred.

There is no finding in the record in reference to this claim of set off. No error can therefor be assigned in respect of it.

The charter-party provides that the cargo is to be brought to, and taken from alongside, free of lighterage to the ship (fol. 12). The language of this contract is too plain to call for construction.

See Franceso *vs.* Massey, 8 L. R., Ex. 101.

"Demurrage," means demurrage at the port of loading and discharge.

The appellants gave notice that they would provide lighterage and provided it voluntarily.

JAMES LOWNDES,
Attorney for Appellee.